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by oral evidence that it was intended as a mortgage, and such evidence is not restricted to cases of fraud, accident, or mistake.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. § 37.\* 10 Va.-W. Va. Enc. Dig. 35.]

**2. Mortgages (§ 36\*)—Absolute Deed as Mortgage—Evidence—Sufficiency.**—The presumption is that a deed absolute on its face is what it purports to be, and, while oral evidence is admissible to show that it is a mortgage, it must be clear and convincing.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. § 36.\* 10 Va.-W. Va. Enc. Dig. 36.]

**3. Mortgages (§ 32\*)—Absolute Deed as Mortgage.**—Whether a deed is to be regarded as a mortgage depends upon the circumstances under which it was made, the relations, and negotiations between the parties.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\* 10 Va.-W. Va. Enc. Dig. 31, et seq.]

**4. Mortgages (§ 38\*)—Absolute Deed as Mortgage—Evidence.**—The evidence held to show that a deed absolute on its face was in reality a mortgage.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 38.\* 10 Va.-W. Va. Enc. Dig. 35, et seq.]

Appeal from Circuit Court, Roanoke County.

Suit by Ida Bachrach against Isaac Bachrach. Decree for complainant, and respondent appeals. Affirmed.

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BECKER *v.* JOHNSON.

Sept. 15, 1910.

[68 S. E. 986.]

**1. Equity (§ 447\*)—Bill of Review—Requisites.**—After dismissal of a suit to avoid a sale of stock for false representations, the court should have allowed plaintiff to file a bill of review, based on newly discovered evidence, the bill being verified and accompanied by an affidavit as to the false representations, and it appearing that plaintiff had unsuccessfully tried to obtain such evidence for the trial from the affiant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091, 1094; Dec. Dig. § 447.\* 2 Va.-W. Va. Enc. Dig. 386.]

**2. Equity (§ 447\*)—Bill of Review—Newly Discovered Evidence.**—In a suit to declare a sale of stock void for false representations that a certain person had bought some of the stock and had paid a certain price for it, plaintiff's request to such person to testify as to whether he had made such purchase was the use of such reasonable

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

diligence to obtain that evidence as should sustain a bill of review on the ground of the subsequent procurement of such evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091, 1094; Dec. Dig. § 447.\* 2 Va.-W. Va. Enc. Dig. 393, et seq.]

**3. Equity (§ 460\*)—Bill of Review—Affidavit—Sufficiency.**—Where plaintiff in a suit in equity seeks a review for newly discovered evidence, his verified bill accompanied by the affidavit of the proposed new witness setting forth his testimony, and declaring his willingness to testify, fulfills the requirement that an answer under oath requires at least the testimony of two witnesses, or of one witness and corroborating circumstances to overcome it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1122; Dec. Dig. § 460.\* 2 Va.-W. Va. Enc. Dig. 387.]

Appeal from Corporation Court of City of Roanoke.

Suit by Becker against Johnson. From the decree for defendant, and the decree overruling the motion to file a bill of review, plaintiff appeals. Reversed.

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SHOFFNER *v.* SUTHERLAND et al.

Sept. 15, 1910.

[68 S. E. 996.]

**1. Appeal and Error (§ 171\*)—Questions Reviewable—Theory of Case in Trial Court.**—Where a case was tried in the lower court on a theory not presented by the pleadings, the court on appeal will review the case on the same theory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1061; Dec. Dig. § 171.\* 1 Va.-W. Va. Enc. Dig. 576.]

**2. Waters and Water Courses (§ 75\*)—Pollution of Stream—Rights of Riparian Owners.**—Any use of a stream that materially fouls the water, or a deposit therein of any filth that so far affects the water as to impair its value for ordinary purposes, or anything which renders the water offensive to taste or smell, or which is calculated to excite disgust in those using it for ordinary purposes, is a nuisance, which equity will enjoin at the suit of a riparian owner injured thereby.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 66; Dec. Dig. § 75.\* 13 Va.-W. Va. Enc. Dig. 683.]

**3. Waters and Water Courses (§ 75\*)—Pollution of Stream—Rights of Riparian Owners.**—An operator of a sawmill on a stream threw sawdust into the stream, so that the same was deposited in it and in springs near to it. The deposits discolored the water, and in warm

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.